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No.

IN THE
SUPREME COURT of the UNITED STATES

LINDA K. WALKER
Petitioner

v.

KENNETH APFEL, COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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96 pp

QUESTION PRESENTED

Public Law No. 104-121, Section 105(b)(1) Contract with America Advancement Act of 1996 prohibits eligibility for benefits to Social Security and Supplemental Security Income claimants where drug and or alcohol abuse is material to the disability.

The question presented is whether methadone addiction in the course of prescribed treatment properly falls under the ambit of drug and alcohol abuse addressed by this law, or whether such an interpretation is contrary to the intent of the law and to the Social Security Administration's regulations, and adversely affects the rights and expectations of Social Security and Supplemental Security Income claimants.

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The Administrative Law Judge's decision dated June 28, 1997; the Appeals Council decision by Mark K. Haydu, an Appeals Officer dated January 19, 1999; the United States District Court of the Northern District of Alabama decision by District Court Judge Inge P. Johnson dated November 4, 1999; the Eleventh Circuit decision by United States Circuit Judge Black, Judge Hull and Judge Marcus dated September 15, 2000; and the denial of the Petition for Rehearing en Banc by United States Circuit Judge Black, Judge Hull and Judge Marcus dated December 8, 2000 are all unpublished decisions attached in Appendix A.

STATEMENT OF JURISDICTION

Pursuant to SCUS Rule 10, jurisdiction is based on the compelling ground that a United States Circuit Court has decided an important question of federal law arising from a federal statute that has not been, but should be, settled by this Court.

STATUTORY PROVISIONS AND GOVERNING REGULATIONS INVOLVED

Public Law No. 104-121, Section 105(b)(1) Contract with America Advancement Act of 1996 prohibits eligibility for benefits to Social Security and Supplemental Security Income claimants where drug and/or alcohol abuse is material to the disability.

20 C.F.R. 404.1535 requires the Social Security Administration to analyze whether a claimant would still be disabled if he or she stopped using drugs or alcohol.

Methadone treatment is specifically mentioned by the Social Security Administration as a recognized and acceptable form of substitution therapy (20 C.F.R. 416.937(c)).

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

Linda K. Walker (Petitioner)[1] filed an application for Disabled Widows Social Security disability and Supplemental Security Income benefits on March 8, 1994, alleging that she became unable to work because of spastic colon on January 1, 1998. A request for hearing was filed on August 24, 1994. On November 27, 1995, a hearing before an Administrative Law Judge (ALJ) was held when the possibility of amending the onset date to December 18, 1993, consistent with the date of death of Petitioner's husband, was raised.

No decision was issued by the ALJ pending a change in the law relating to D & A abuse. On September 17, 1996 a notice was sent to Ms. Walker putting the burden[2] on her to show that D & A was not a material factor in her disability. A supplemental hearing was held before the same ALJ on April 2, 1997.

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[1] Deceased. See paragraph 6 this section

[2] In fact **the burden is on the Social Security Administration** to show such materiality (20 C.F.R. 404.1535; 416.935).

A decision was issued by the ALJ on June 28, 1997 finding that Ms. Walker is disabled under Sections 202(e) and 223 of the Act but that drug abuse was material to her disability, and that she would not be disabled if she stopped engaging in drug abuse; and denying her benefits.

The decision was appealed and an appeal brief was filed on April 3, 1998. On January 19, 1999, a "form" denial of the request for review was issued by a non-judge Appeals Officer on behalf of the Appeals Council, with no substantive review of the evidence or counsel's argument, other than a statement that it had been considered. This denial was the final decision of the Commissioner of the Social Security Administration, and Petitioner exhausted her administrative remedies.

An action for judicial review was filed by and through counsel in Federal Court pursuant to §1631(c)(3) of the Social Security Act, 42 U.S.C. §1383 on March 22, 1999. The District Court affirmed the decision of Respondent in its Memorandum Opinion dated November 4, 1999, and an Order was entered on November 4, 1999.

In the interim Ms. Walker died of untreated peritonitis on October 5, 1999. Petitioner's mother, Ms. Lois Myers, as next of kin, is entitled to benefits in the Title II Social Security claim (42 U.S.C.A. 404(d)(3)) through September 1999, the month before her death (20 C.F.R. 404.316(b)(1)). The claim is therefore continued by administratively substituted party, Ms. Lois Myers, Ms. Walker's mother. Reference to Petitioner is intended to apply to the administratively substituted party in Ms. Walker's behalf.

A panel decision was issued by three members of the United States Court of Appeals for the Eleventh Circuit on September 15, 2000 affirming the final administrative decision. A Petition for Rehearing en Banc was denied by the same members on December 8, 2000.

B. STATEMENT OF THE FACTS

Petitioner, Ms. Walker was 54[3] at the time of the ALJ decision with a GED but no past relevant work history. She had a long history of intermittent solid food dysphagia from at least 1991. She also had a long psychiatric history involving overdosage of prescription medication and alcohol ingestion seen as suicidal gestures going back to at least 1964. Detailed psychiatric progress notes through the 1970s, 80s, and early 90s show multiple admissions, prescriptions for Ritalin through 1976 and continued prescriptions for Tofranil, Valium, Restoril, and Darvon/Darvocet by the same physician. From early on, it was noted that there was a considerable degree of underlying depression.

In recognition of her substance abuse, Ms. Walker began Methadone treatment in October 1992. Ms. Walker's husband died on December 18, 1993. She filed for widow's and Supplemental Security Income disability benefits in March 1994. By the time of a physical consultative examination on behalf of the Social Security Administration in July 1994 she was noted to be "obviously on Methadone." The internist listed depression and anxiety first and second in his impressions as the major component.

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[3] Date of Birth November 19, 1942.

Ms. Walker testified that she stopped drinking after her husband died and the medical records in 1995 show only a past history of alcoholism. By the time of a psychological evaluation in July 1996 she was on Methadone and Reglan[4]. As reported by the ALJ, her treating physician for chronic esophagitis recommended in February 1997 that she continue this regimen to include **both** medications.

Ms. Walker denied illicit drugs and alcohol upon consultative examination in April 1997. It was noted that she "gives history of depression from an early age." She was diagnosed with Major Depression, recurrent with generalized anxiety features and assessed as having marked restrictions in her ability to function, as summarized by the ALJ, on a sustained basis in a routine work setting or elsewhere.

The ALJ determined that Ms. Walker is unable to engage in substantial gainful activity because of drug dependency. He did not include depression or anxiety as severe impairments, noting that they were "subjective complaints." If she stopped taking drugs (presumably Methadone), according to the ALJ she was otherwise able to engage in light work.

The United States District Court found that she would not be disabled if she stopped Methadone **because** she would still have a dependency for the drugs she took in the first place. The Eleventh Circuit found that the CAAA was applicable to Ms. Walker's claim based on the ALJ's rationale.

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[4] A prescription medication for gastroesophageal reflux (Physicians Desk Reference, 46th Ed, page 1870).

With no past relevant work, and a residual functional capacity for the full range of light work at the age of 55, Ms. Walker would be disabled under Medical Vocational Rule 202.04 (20 C.F.R. Part 404, Subpart P, Appendix 2).

SUMMARY OF THE ARGUMENT

The evidence of record establishes that Ms. Walker's opiate abuse ceased some time in 1992 at the time of entry into Methadone treatment and that drinking had stopped by the time of her husband's death in December 1993. There is no evidence of record to establish that Ms. Walker was addicted to any other drug than Methadone during the period at issue. This type of addiction does not fall within the ambit of drug and alcohol abuse targeted for regulation by Congress which prohibits payment of benefits to Social Security and Supplemental Security Income claimants where such use is material to the disability. Methadone is a form of treatment recognized by the Social Security Administration itself. The Social Security Administration's own policy mandates that a claim cannot be denied simply on the basis of methadone dependence. Even if Methadone addiction were to be considered drug abuse, according to medically recognized standards, maintenance on Methadone would not resolve or have any effect on otherwise disabling mental impairments of anxiety and depression.

The Social Security Administration is required to analyze whether a claimant would still be disabled if he or she stopped using drugs or alcohol, which if material to the disability preclude eligibility for Social Security and Supplemental Security Income benefits. Based on this provision, the ALJ concluded that Ms. Walker would not be disabled if she stopped taking Methadone; the United States District Court speculated that she would not be disabled if she

stopped Methadone because she would still have a dependency for the drugs she took in the first place, that Court's rationalization therefore focussing on drugs she might take rather than drugs she legitimately does. The Eleventh Circuit found that the CAAA was applicable to Ms. Walker's claim based on the ALJ's rationale. All three entities erred in misapplying C.F.R. 404.1535 in the context of methadone addiction.

REASONS FOR GRANTING THE WRIT

I.

METHADONE THERAPY IS A PRESCRIBED FORM OF TREATMENT RATHER THAN DRUG ABUSE.

Methadone maintenance is as much a prescription and course of treatment to be followed as any other physician orders. In fact, Methadone maintenance services are funded in many states by Medicaid, and it has been held that once a state approves such a program for Medicaid funding, it is to be made available in the same way as any other medical service. Sobky v. Smoley, 855 F.Supp. 1123 (E.D. Cal. 1994). One can certainly question the efficacy and even ethical merit of keeping a patient in a Methadone program for so long especially in view of the fact that Methadone itself is addictive. However, if Ms. Walker had not attended the Methadone Maintenance program, particularly in light of her treating physician's recommendation to continue, the ALJ or any other representative of the Social Security Administration arguably could have determined her automatically not disabled for failure to follow prescribed treatment that could restore the ability to work. Lucas v. Sullivan, 918 F.2d 1567, 1571 (11th Cir. 1990); (20 C.F.R. 404.1530; 416.930).

There is no evidence of record to establish that Ms. Walker regularly engaged in any type of drug use other than Methadone for the period under consideration and the ALJ erred in finding she would not be disabled if she stopped taking it.

The medical evidence establishes that Ms. Walker was on Methadone maintenance for **prior** pain and analgesic medication abuse, much of which had been prescribed over at least a twenty year period by a treating physician. An assessment from the Methadone Treatment Center in October 1994 included a notation that Ms. Walker was a candidate for continued Methadone maintenance on the basis that the patient was functional while on Methadone. This observation was significant because the other choices for continued candidacy were on the basis that either patient is poorly motivated to lead a chemically free lifestyle or patient has prior history of returning to illicit drug usage. The examiner had the option of checking all three boxes but neither of the above was chosen. The diagnostic impression at that time was Methadone maintenance rather than the other alternative Chemical Dependency. There was no indication she was taking any drug other than Methadone at her evaluation in July 1996.

It would appear to be contradictory and counterproductive to have one branch of government funding programs to attempt to keep people off drugs and functional by prescribing Methadone, and another maintaining that failing to stop engaging in this activity causes people to be disabled. Respectfully stated, eradicating legitimate drug usage in order to prevent the greater evil of other drug abuse was not the target under P.L. 104-121.

II.

THE ELEVENTH CIRCUIT PANEL DECISION ADOPTING THE ALJ RATIONALE IS AGAINST THE INTENT OF THE CAAA AND THE SOCIAL SECURITY ADMINISTRATION'S REGULATIONS.

The Eleventh Circuit Court specifically concluded that the CAAA was applicable to Ms. Walker's case, rationalizing that "Simply stated, Walker's prescription drug abuse necessitated her methadone treatment, and thus her benefits were denied. Walker's prescription drug abuse was therefore a "contributing factor material" to the determination that she was unable to work".

Thus, as stated in correspondence dated September 28, 2000 from a representative of NOSSCR, the Court misapplied the standard for evaluating disability for an individual who has a drug addiction. The Court appeared to find that the mere fact that she was taking methadone or that she abused prescription drugs forced a finding of non-disability. The correct standard is to first determine whether the individual is disabled, taking into consideration all of her impairments. If the individual is disabled, the next step is to remove those limitations caused by her drug abuse. If the remaining impairments are disabling, the individual is entitled to benefits regardless of her continued drug use.

The Congressional Record reveals an absence of reference to prescription medication or methadone. A medical policy clarification statement dated July 20, 1995 - DAA Materiality decision when claimant is in a methadone treatment program - issued by the Social Security Administration encapsulates the Social Security

Administration's policy that a claim cannot be denied simply on the basis of methadone dependence[5].

It is objectively reasonable to infer from the language of the Public Law that the volunteer behaviors of engaging in excessive drinking and illegal drugs were its targets. In one guide it has been summarized as "elimination of benefits to those using drugs unlawfully" (Glin Guide, United States, Part 13: Public Laws of 104th Congress).

Methadone treatment is specifically mentioned by the Social Security Administration as a recognized and acceptable form of substitution therapy (20 C.F.R. 416.937(c)).

If methadone treatment is a form of treatment it cannot be a form of abuse. Abuse is the cornerstone premise of Public Law 104-121 which was designed to preclude benefits where there would be no disability but for drug abuse. If substitution therapy is not abuse, then the Public Law does NOT apply under those circumstances; and the inquiry as to what potentially disabling conditions remain if drugs and alcohol are removed from consideration under 20 C.F.R. 404.1535 equally does not apply.

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[5] Issued prior to the enactment of P.L. 104-121 when drug or alcohol addiction was acknowledged as disabling.

III.

THE RATIONALE THAT BUT FOR METHADONE USAGE, A CLAIMANT WOULD BE ABUSING DRUGS OR ALCOHOL WHICH WOULD LEAD TO A FINDING OF MATERIALITY AND NON-DISABILITY IS SPECULATIVE AND AGAINST PUBLIC POLICY.

The United States District Court found that the ALJ determined Ms. Walker's drug abuse/dependence material to disability within the meaning of 20 C.F.R. 404.1535, that she was placed on a Methadone maintenance program in order to withdraw from and not return to substance abuse, and that in light of her continued need for Methadone, the ALJ properly found that she still remained with a dependence to the drugs. The logic of the Court's analysis appears to be that if Ms. Walker stopped taking Methadone, she would revert to drugs and alcohol of the type contemplated under the Act, which would in turn render her not disabled if she stopped taking them.

The Eleventh Circuit Court purported not to consider this rationale but in fact, respectfully stated, this rationale underlies the resulting decision.

The Court's argument is flawed, first because the code section cited directs an analysis of a claimant's disability if they were to **stop** drinking or using drugs. All the evidence indicates that Ms. Walker **had** stopped engaging in drug/alcohol abuse long after her husband died, **several years** before this analysis was due. The only "substance" or "drug" she was taking was Methadone, a prescription medication (discussed above). The analysis therefore turns on whether Ms. Walker would be disabled if she stopped taking Methadone. Secondly, even if there were a grain of logic to

the argument of the Court below, the Court exceeds its authority in punitive over speculation. It is not the task of that Court or the ALJ to consider materiality against the drugs she **might** take, rather than the drugs she does take.

IV.

METHADONE MAINTENANCE IS NOT IN ANY EVENT MATERIAL TO THE ANALYSIS OF THE EFFECT OF ALL REMAINING IMPAIRMENTS.

The ALJ found that the Petitioner's drug abuse/dependence imposes moderately severe restrictions upon her ability to respond to customary work pressures, and thus prevents her from engaging in any substantial gainful activity, but that her other impairments do not prevent her from performing light work. First, there is no indication that Ms. Walker was engaging in continued opiate abuse of the type which led to methadone maintenance, or any continued and systematic opiate abuse other than Methadone itself. Medical records in 1995 show only a past history of alcoholism.

According to accepted medical standards, Methadone can produce drug dependence of the morphine type and therefore has the potential for being abused. However, Methadone is a synthetic narcotic analgesic. It is not a tranquilizer. Patients who are maintained on this drug will react to life problems and stresses with the same symptoms of anxiety as do other individuals. The action of methadone in maintenance treatment is limited to the control of narcotic symptoms and is ineffective for relief of general anxiety. (PDR, 46th Ed., 1992) Thus, even if the sustained use of Methadone could be considered drug addiction within the ambit of the statute, Ms. Walker's mental problems, and in particular her marked impairment in ability to respond to work

pressures, would not resolve if she stopped using Methadone, and Ms. Walker would be disabled with or without Methadone use.

Further, Petitioner testified and the medical evidence shows that she had always had problems with nervousness and panic attacks. She had been diagnosed on multiple occasions by many physicians even in the context of a physical examination with depression and anxiety, described as underlying. Notably, the ALJ did not include depression or anxiety as severe impairments, noting that they were "subjective complaints."

CONCLUSION

A judicial finding that methadone addiction in the course of prescribed treatment constitutes drug and alcohol abuse is contrary to the intent of the CAAA and contrary to the Social Security Administration's own rules and regulations. As a matter of public policy, candidates for methadone treatment should not be barred from receiving Social Security or Supplemental Security Income benefits on this basis.

The evidence of record establishes that opiate abuse ceased some time in 1992 at the time of entry into Methadone treatment and that drinking had stopped by the time of Ms. Walker's husband's death in December 1993. There is no evidence of record to establish that Ms. Walker was addicted to any other drug than Methadone. This type of addiction does not fall within the ambit of drug and alcohol excesses targeted for regulation by Congress. Even if Methadone addiction were to be considered drug abuse, according to medically recognized standards, maintenance on Methadone would not resolve or have any effect on Ms. Walker's mental impairments of anxiety and depression.

The evidence of record suggests an onset date of December 18, 1993 consistent with the date of death of Ms. Walker's husband, the date she stopped drinking, and as originally contemplated; or in the alternative June 28, 1997, the date of the ALJ decision, when Ms. Walker was four months away from her 55th birthday, when under a non mechanical application of the Medical Vocational Rules, Ms. Walker was disabled under the ALJ's own rationale.

Petitioner respectfully requests this Court to hold that prescribed Methadone maintenance while resulting in addiction, is not unlawful and does not constitute drug and alcohol abuse of the type contemplated under P.L. 104-121; and to vacate and reverse the decisions below and award the benefits claimed.

Respectfully submitted,

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